Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

No. 77-596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

GULF OIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON D. C. 20001

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FEDERAL ENERGY REGULATORY COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gulf Oil Corporation petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on September 7, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed in Appendix A, pp. 1a-58a.[1] The order of the Court of Appeals denying rehearing to Gulf, not yet reported, is printed in Appendix B, pp. 59a-62a. The

[1] The Appendices to this Petition containing the opinions below, the judgment, the agency opinions, and texts of the statutes involved have been printed in a separate volume.

opinion and orders of the Federal Power Commission, styled Opinion No. 780, are not yet reported and are printed in Appendix D, pp. 67a-94a. The Commission opinion and orders denying rehearing, styled Opinion No. 780-A, are not yet reported and are printed in Appendix E, pp. 95a-116a.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1977 (Appendix C, pp. 63a-65a). The order of the Court of Appeals denying Gulf's timely petition for rehearing was entered on September 26, 1977 (Appendix B, pp. 59a-62a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (successor to the Federal Power Commission) has jurisdiction to decide issues of contract interpretation establishing a producer's delivery obligations for a regulated sale of natural gas prior to receipt of decision of a Board of Arbitrators considering those issues in accordance with controlling provisions of the producer's sales contract, the Commission certificate authorizing the producer's sale under Section 7 of the Natural Gas Act, and the Federal Arbitration Act.

2. Whether the Commission has power under Sections 7(c) or 16 of the Natural Gas Act to order a natural gas producer to pay "refunds" or "damages" to a pipeline purchaser as "compensation" for underdeliveries of

[2] On October 1, 1977, the Federal Energy Regulatory Commission succeeded to the functions and duties of the Federal Power Commission under the Natural Gas Act (Department of Energy Organization Act, 91 Stat. 565 (1977), 42 U.S.C. § 7101, Note). References to "the Commission" in this Petition are to both agencies.

natural gas during periods when all amounts collected by the producer have been in accordance with the producer's filed, effective rates under Section 4 of that Act and no amounts have been collected subject to refund.

3. Whether the Court of Appeals erred in affirming Commission conclusions as to a natural gas producer's daily delivery obligations by disregarding evidence as to industry practice and past agency recognition of daily "swing" provisions customary in producers' sales contracts, and by refusing to remand for further Commission proceedings in light of relevant Commission documents, reflecting errors in the Commission's conclusions, which were released by the Commission under the Freedom of Information Act only after judicial review commenced.

STATUTES INVOLVED

Sections 1, 2, 3 and 4 of the Federal Arbitration Act, 61 Stat. 670 and 671 (1947), 9 U.S.C. §§ 1, 2, 3 and 4, are set forth in Appendix F, pp. 124a-127a. Sections 4, 7(b), 7(c), 7(e), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, 822, 824, 830, 831 (1938), as amended, 15 U.S.C. §§ 717(c), 717f(b), 717f(c), 717f(e), 717o, and 717r(b), are set forth in Appendix F, pp. 117a-124a.

STATEMENT

In 1963, Gulf Oil Corporation (Gulf) applied to the Commission under Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing a proposed sale of natural gas by Gulf to Texas Eastern Transmission Corporation (Texas Eastern), an interstate pipeline company (I App. 5-6).[3] The application, precedent agreement, and other documents sub-

[3] References to the three volume Appendix in the Court of Appeals are to the volume and page number as used below (*e.g.*, I App. ——, II App. ——, III App. ——, *etc.*).

mitted showed that Gulf proposed to deliver natural gas under what has been termed a "warranty" contract, providing, *inter alia*, a term of 26 years from the date of initial delivery or until 4,437,675,000 thousand cubic (Mcf), or approximately 4.4 trillion cubic feet (Tcf), are delivered, whichever first occurs; a daily contract quantity (DCQ) of 500,000 Mcf; and a "swing" provision under which Texas Eastern may nominate, at any time and from time to time, a daily quantity up to 125% of the DCQ, or a maximum of 625,000 Mcf per day (III App. 1112-1116, 1127-1132).

The contract did not provide for dedication or commitment of specific producing fields, but provided for deliveries at Gulf's processing plant near Venice, Louisiana (III App. 1105-1106; 1133-1134). The contract recited that Gulf contemplated sale of natural gas produced "from fields located in southern Louisiana, offshore thereof and from fields located in the general area of the pipeline system of Texas Eastern" (I App. 10-42); and in its 1963 submission to the Commission, Gulf showed that it had estimated reserves of approximately 2.7 trillion cubic feet (Tcf) in the West Delta Block 27 Field available for delivery to Texas Eastern (II App. 550-552; I App. 6). The contract also included provisions for the price to be charged by Gulf over the life of the contract (III App. 1127-1132); for operation of *force majeure* if certain specified events impaired Gulf's ability to deliver (III App. 1118); and for binding, compulsory arbitration of any dispute between the buyer and seller arising out of the agreement (III App. 1122).

Gulf's 1963 application was the subject of public notice, but not of formal hearings before the Commission (I App. 54-59). Instead, the Commission's Staff reviewed Gulf's application and supporting documents, companion applications filed by Texas Eastern and another pipeline, and data supplied by the applicants in conferences with

the Commission's Staff, including data on the estimates of Gulf's available reserves in the West Delta Block 27 Field. Thereafter, the Commission considered the applications on the basis of the submissions of the applicants and Staff Memoranda summarizing the contract, including the "swing" provisions and contemplated operations thereunder, and data as to the West Delta Block 27 Field reserves.

On December 19, 1963, the Commission issued certificates to Gulf, Texas Eastern, and another pipeline applicant, noting the nature of the "warranty" contract; the availability of the DCQ of 500,000 Mcf to Texas Eastern and Texas Eastern's intent to take higher quantities on "peak" days; and the proposal to deliver gas produced "from reserves located in fields in southern Louisiana, primarily the West Delta Block 27 Field, Plaquemines Parish, Louisiana" (I App. 54-68). The Commission found the sale as proposed to be in the public interest and issued a certificate under Section 7(c) of the Act as sought by Gulf with no conditions other than to require Gulf to accept the certificate within thirty days (I App. 69-70).

Gulf accepted the certificate, filed its contract with Texas Eastern as Gulf's Rate Schedule No. 278 under Section 4 of the Natural Gas Act, and commenced deliveries to Texas Eastern in 1964 (I App. 69; III App. 1101). Shortly thereafter, it was discovered that the estimates of reserves in the West Delta Block 27 Field were substantially in error and insufficient to support Gulf's projected deliveries to Texas Eastern (III App. 1242-1243).[4] Gulf then commenced connecting other fields,

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[4] Some sands in the field thought to be hydrocarbon-bearing contained fresh water, a circumstance unheard of at the time for the depth involved. Other sands which tested productive from one well proved to be impermeable in another; and the unusual thickness of sands—up to a maximum of 340 feet—magnified errors in estimates

amended the contract to add new delivery points in the Southern Louisiana area, and purchased gas from other producers for redelivery by Gulf to Texas Eastern at substantial losses to Gulf (II App. 556-557; III App. 1061, 1234-1236, 1245, 1440).[5]

During this period, the Department of the Interior imposed a moratorium on general sales of offshore Louisiana leases,[6] and by 1971, Gulf had no uncommitted reserves or unexplored leases of consequence in Southern Louisiana (I App. 126, III App. 1062, 1247) and projected that it would be unable to deliver the daily contract quantity to Texas Eastern beyond 1973. Gulf and Texas Eastern then sought Commission approval of an amendment to the contract providing *inter alia* for dedication of specific reserves, price relief for Gulf, and extension of the contract term (III App. 1032-1060); but after hearings, the Commission in 1974 refused to approve the amendment, denied Gulf relief, and stated that it would hold Gulf to its "obligations" under the unamended contract (I App. 118-147, 185-195).

After resumption of regular general offshore Louisiana area lease sales in 1972, Gulf engaged in a vigorous exploration and development program on the leases acquired at the new sales. However, because of the unavoidable time required for such development and the construction

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(II App. 541-544). The Commission has found that there is no evidence that the errors in reserve estimates were other than "good faith" errors (I App. 137).

[5] As of September 30, 1975, Gulf had paid other producers $14,927,005 more for natural gas than Gulf could collect from Texas Eastern under the pricing provisions of the Gulf-Texas Eastern contract and Gulf's effective rates under Section 4 of the Natural Gas Act (II App. 541-544).

[6] During a ten-year period ending in September, 1972, the Department of the Interior held only two general offshore Louisiana lease sales (III App. 1062, 1247). In the succeeding three-year period it held eight such sales (III App. 1247).

of delivery facilities, Gulf was unable to maintain deliveries to Texas Eastern at 500,000 Mcf per day in 1974 and 1975.

On November 7, 1975, the Commission issued an order directing Gulf to show cause why it should not be required to fulfill its certificate obligations, directing presentation of evidence in formal hearings before an Administrative Law Judge (I App. 196-200). Gulf submitted evidence as directed, including evidence as to its deliveries, its purchases from others, expenditures for lease acquisitions and exploration and development, and its efforts to increase deliveries to Texas Eastern.[7] Gulf also submitted evidence as to its reserves and projections of deliveries showing that Gulf expected to be able to deliver the DCQ of 500,000 Mcf per day or more in 1977 and the total contract quantity of 4.4 Tcf by some time in 1987, three years before the expiration of the 26-year contract term (II App. 763-764, III App. 1254, 1257).

The record also showed that, by letters dated November 20, 1975 and July 16, 1976, Gulf had invoked the arbitration provisions of the contract to resolve disputes as to Gulf's contract delivery obligations, *i.e.*, (1) whether Gulf's delivery obligation is limited to gas which it is commercially practicable to deliver; (2) whether Gulf is excused from failure to deliver gas which resulted from mutual mistake of material facts as to reserves in the West Delta Block 27 Field or from the natural gas shortage; and (3) whether failure of the Department of the Interior to hold regular offshore Louisiana lease sales was an act of *force majeure* under the contract (III App. 1598-1599, 1611-1612). The Commission was advised that

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[7] *Inter alia*, Gulf showed that since September 1, 1972, Gulf had expended $576,315,000 in acquisition of offshore Louisiana leases, and had expended, in the past five years, $197,988,000 in exploration, development, and connection of these newly-acquired leases (III App. 1248-1249, 1522-1523).

Texas Eastern had sought to enjoin the arbitration proceeding in the United States District Court for the Southern District of Texas, Houston Division, on grounds that the Commission had primary jurisdiction, but that no injunction had been issued, and the proceedings before the Board of Arbitrators had commenced, as contemplated by the contract. Gulf's position therefore was that as to the issues submitted to arbitration, the Commission should withhold decision until completion of arbitration and receipt of the decision of the arbitrators.

The Commission Administrative Law Judge issued his decision on August 13, 1976, refusing to defer decision on issues submitted to arbitration, finding that Gulf had not complied with its contract and certificate obligations on any day Texas Eastern had demanded the maximum quantity of 625,000 Mcf and Gulf had not delivered that quantity, and recommending remedial orders by the Commission (I App. 237-264). Exceptions were filed by Gulf and others.

On October 15, 1976, the Commission issued Opinion No. 780 (Appendix D, pp. 67a-94a), finding Gulf had failed to deliver in accordance with its contract, ordering "refunds" for past deficiencies, and ordering increased deliveries. The Commission concluded that it was not required to await decision by the Board of Arbitrators and that Gulf's obligations were unaffected by the doctrine of commercial impracticability, by the mistake as to reserves in the West Delta Block 27 Field, or by the Department of the Interior moratorium on lease sales. The Commission also rejected Gulf's position that Gulf's daily delivery obligation is the 500,000 Mcf per day DCQ, averaged over a year, holding instead that Gulf is obligated to deliver the maximum or "peaking" volume of 625,000 Mcf per day each and every day Texas Eastern so demands. From this premise, the Commission concluded that during 1974, 1975, and 1976, on the days Gulf failed

to deliver 625,000 Mcf per day, Gulf was in violation of its contract and certificate; and that under Sections 7(c) and 16 of the Act, Gulf must "refund" to Texas Eastern, for flow-through to its customers, an amount then computed as $89,600,000 principal with interest for specific past periods as "damages" or "compensation" for the delivery deficiencies.[8] The Commission provided that Gulf could "recoup" such payments at a future date when the volume remaining to be delivered under the contract equaled the past deficiencies, but ordered continuous "refunds" if Gulf's future deliveries did not equal Texas Eastern's demand. The Commission further ordered that Gulf commence delivering the maximum or "peaking" volume of 625,000 Mcf on December 15, 1976, and advised that if Gulf failed to do so, the Commission would seek court enforcement of its order (Appendix D, pp. 89a-92a).

By Opinion No. 780-A, issued December 9, 1976, the Commission denied applications for rehearing and modified Opinion No. 780 only to provide (1) that if Gulf delivers in excess of 625,000 Mcf to Texas Eastern, the price will be increased to permit Gulf to recoup a portion of the "refunds" previously paid on an equivalent volume of gas, and (2) the Commission's orders as to "refunds" were not intended to preclude customers of Texas Eastern from seeking compensation for damages, if any, allegedly not compensated by Commission action (Appendix E, pp. 95a-116a).

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[8] The Commission's "refund" formula requires (1) determining the volume difference between Gulf's deliveries and Texas Eastern's demand, (2) determining the difference between Gulf's contract price of approximately 19 cents per Mcf and the higher maximum rates prescribed by the Commission for producers' sales in the Southern Louisiana area (ranging from 26 cents to $1.42 per Mcf); and (3) multiplying the volume deficiency by this price differential (Appendix D, pp. 78a-80a).

On review, the Court of Appeals affirmed the Commission (Appendix A, pp. 1a-58a).[9] On the questions presented here:

(1) A majority of the Court of Appeals concluded that the Commission had jurisdiction to decide the merits of issues submitted to arbitration despite their pendency before the Board of Arbitrators in accordance with the contract provision, the certificate, and the Federal Arbitration Act (Appendix A, pp. 12a-15a). The majority recognized that the Commission had approved the arbitration clause without condition, and that to decide issues of Gulf's contract and certificate obligations, the Commission "necessarily must resort to terms of the contract" (Appendix A, p. 14a). Nevertheless, the majority concluded the provision did not bind the Commission, that deferral by the Commission would "unnecessarily expend precious time, effort, and money" (Appendix A, p. 15a), and that the Commission's summary disposition of the merits of the arbitration issues was correct (Appendix A, p. 15a), even though Gulf's presentation on the issues submitted to arbitration was not in the record before the Commission or before the court. Dissenting, Judge Aldisert concluded that the Commission was required to defer decision in compliance with the Federal Arbitration Act, the binding provisions of the contract, and the Commission's own approval of those provisions in issuing the certificate to Gulf in 1963 (Appendix A, pp. 53a-58a).

(2) The Court of Appeals rejected Gulf's position that its daily delivery obligation is measured by the DCQ of 500,000 Mcf per day and accepted the Commission's interpretation that the maximum or "peaking" volume of 625,-

[9] On December 15, 1976, the Court of Appeals granted a temporary stay of the Commission's orders, and on December 22, 1976, granted Gulf's Motion For Stay pending completion of judicial review. On October 7, 1977, the court granted Gulf's Motion for stay of issuance of its mandate to and including October 26, 1977, and upon the filing of this Petition, until this Court disposes of the case.

000 Mcf must be delivered on any day demanded (Appendix A, pp. 8a-11a). The court did state "the question is close" and that it was disturbed by the "failure" of the Commission or intervenors to explain satisfactorily the use of the words "Daily Contract Quantity" in the contract (Appendix A, p. 11a). In seeking rehearing, Gulf pointed out that the court had not considered cited materials showing industry use and Commission recognition of such contract terms to fix daily delivery obligations and higher "peaking" quantities in the 1960s and 1970s. Alternatively, Gulf urged remand for Commission reconsideration, particularly in light of the Commission's 1963 Staff Memorandum analyzing the contract in a manner supporting Gulf and refuting the Commission's current interpretation, which had been released to Gulf under the Freedom of Information Act only on the eve of the June 7, 1977 oral argument in the Court of Appeals;[10] but Gulf's petition was denied (Appendix B, pp. 59a-62a).

(3) On the question of Commission power to order "refunds" or "damages," the Court of Appeals recognized that no amounts had been collected by Gulf subject to refund under Commission orders under Sections 4 or 7 of the Act, that the Commission had found no "abandonment" by Gulf under Section 7(b) of the Act, and that

[10] In review of Gulf's application in 1963, the Commission relied upon Staff Memoranda analyzing the contract and supporting data submitted by Gulf and Texas Eastern. In 1974, Gulf sought release of such memoranda under the Freedom of Information Act, but then was advised that such memoranda could not be located. In February, 1977, Gulf again sought release under the Freedom of Information Act, but initially was advised the documents still could not be located. On June 4, 1977, the Commission's Solicitor advised Gulf's counsel a copy of the 1963 Memorandum analyzing Gulf's application had been located. The Court of Appeals was so advised during oral argument on June 7, 1977, and Gulf lodged copies of this document with the court on June 13, 1977. In Gulf's view, contents of this Memorandum are and always have been critical to review of the issues of contract interpretation pending before the Commission and the Board of Arbitrators since 1975.

the Commission orders were without precedent under Section 7(c) of the Act (Appendix A, pp. 28a-32a). Nevertheless, the court reasoned that the Commission has authority to enforce certificate obligations under Section 7(c), and that Section 16 of the Act provides the Commission with "remedial powers," including substantive authority for the "refund" orders, characterized by the court as, in effect, a "temporary performance bond" (Appendix A, pp. 31a-38a). The court considered its conclusion consistent with, although more limited than, construction of Section 16 in *Mesa Petroleum Company* v. *Federal Power Commission*, 441 F.2d 182 (5th Cir. 1971), but expressly recognized conflict with the construction of Section 16 in *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973), that this section of the Act does not enlarge the Commission powers not otherwise provided by the Act (Appendix A, pp. 37a-38a). The Commission's "refund" orders, including provisions for future recoupment by Gulf attacked by intervenors, thus were affirmed (Appendix A, p. 39a). Gulf's petition for rehearing was denied without opinion (Appendix B, pp. 59a-62a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Congressional Policy Expressed In The Federal Arbitration Act; Is In Conflict With Interpretation of That Act by This Court and Other Courts of Appeals; and Presents Important Questions of Relation of Agency Jurisdiction to Arbitration Which Should Be Resolved By This Court

The Court of Appeals has held that a federal regulatory agency may proceed to decide issues of contract interpretation without awaiting decision by a Board of Arbitrators to which those issues have been submitted in accordance with a contract requiring compulsory, binding

arbitration, with a certificate issued by the agency approving the arbitration provision, and with the provisions of the Federal Arbitration Act. In so holding, the court has disregarded controlling federal policy expressed in that Act, failed to apply principles of decisions of this Court and other Courts of Appeals requiring courts and agencies to defer to arbitration, and has misconstrued and misapplied the Federal Arbitration Act and the Natural Gas Act in resolving issues of the respective jurisdiction of the Commission and of a Board of Arbitrators. The decision thus presents federal questions of major and continuing importance under both of these federal statutes, which should be resolved by this Court:

1. A majority of the Court of Appeals has reached a result conflicting with the established relationship between contracts, the regulatory scheme of the Natural Gas Act, and Commission authority to resolve questions submitted to arbitration.

Under the Natural Gas Act, a sale of natural gas for resale in interstate commerce cannot be made until the seller receives a certificate of public convenience and necessity from the Commission under Section 7(c) of that Act. Under Commission regulations, the seller files an application to sell in accordance with the terms of an attached gas sale contract. If a certificate is granted, the contract and the certificate become indistinguishable, except to the extent that specific "conditions" are attached to the certificate.[11]

In accordance with these regulations, Gulf filed its application with the terms of a contract attached (I App.

[11] Under Section 7(e), the Commission has power to attach to a certificate "conditions" the public convenience and necessity may require. However, "conditions" must be express and cannot be implied. *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 226 F.2d 60, 66-67 (6th Cir. 1955) *cert. den.*, 350 U.S. 987 (1956).

pp. 14-50); and the Commission found that "the sale proposed by Gulf * * * is required by the public convenience and necessity * * *," and ordered "that a certificate of public convenience and necessity is hereby issued to Gulf Oil Corporation for the sale of natural gas * * * [as] *proposed in its application* as hereinafter conditioned." No condition relative to the arbitration provision in the contract was made (I App. pp. 63-65).

Limitations on the scope of the Commission's authority with regard to contracts then became applicable. Those limitations were stated in *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956):

> "In construing the Act, we should bear in mind that *it evinces no purpose to abrogate private rate contracts as such.* * * * *The Natural Gas Act permits the relations between the parties to be established initially by contract*, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." (350 U.S. at 338, emphasis supplied)
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> * * * * *
>
> "*By preserving the integrity of contracts*, (the Act) *permits the stability of supply arrangements which all agree is essential to the health of the industry* * * *. The Act thus affords a reasonable accommodation between the conflicting interest of contract stability on the one hand and public regulation on the other. * * *" (350 U.S. at 344, emphasis supplied)

The court below recognized but failed to give effect to these principles. The court stated:

> "* * * it is to the Gulf-Texas Eastern contract that we must turn. The reason is that *the certificate alone has little substance.* * * * *The scope of the certificate, therefore, is in large part defined by the terms of the contract.*" (Appendix A, p. 8a, emphasis supplied).

However, the court did not recognize applicability of the *Mobile* construction to the arbitration provision of the contract, which the Commission had approved, and then proceeded to conclusions in conflict with the decisions of this Court and the courts of appeals and with controlling federal policy expressed in the Federal Arbitration Act.

The certificated contract in this case provides that "Any dispute arising between Seller and Buyer out of this Agreement shall be determined by a board of three arbitrators," and that "The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto" (III App. pp. 1122-1123). As the court of appeals was apprised, three issues are pending before a Board of Arbitrators for decision. These issues, as summarized by the court, were: "* * * whether Gulf's delivery obligations were wholly or partially excused by (1) commercial impracticality, (2) mutual mistake, or (3) *force majeure*" (Appendix A, p. 12a).[12]

Congressional policy expressed in the Federal Arbitration Act thus applies. As pointed out in the dissent, but ignored by the majority below, that Act expresses "the strong federal policy favoring enforcement of arbitration when the parties have mutually agreed to so resolve contract interpretation disputes" (Appendix A, p. 53a). The Act states:

> "A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * shall be *valid, irrevocable*, and *enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." (Appendix F, pp. 124a-125a).

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[12] Details as to the arbitration issues appear at III App. 1611-1612.

This Court has consistently applied the principles of the Act requiring deferral to arbitration. In *Prima Paint Corporation* v. *Flood and Conklin*, 388 U.S. 395 (1967), the Court held that even fraud in the inception of a contract was a proper subject of arbitration, regardless of state law to the contrary; that a court can determine only whether the "making of the agreement for arbitration" was fraudulently induced; and that "in so concluding, we not only honor the plain meaning of the statute, but also the unmistakably clear Congressional purpose that the arbitration procedure when selected by the parties to the contract, be speedy and not subject to delay and obstruction in the courts" (388 U.S. at 404). Similarly, in *William E. Arnold Company* v. *Carpenters District Council*, 417 U.S. 12 (1974), this Court approved the statement of the National Labor Relations Board that:

> "'When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that *those procedures should be afforded full opportunity to function* . . . We believe it to be consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting (their) dispute in statutory terms, to ignore their agreed-upon procedures.'" (417 U.S. at 16-17, emphasis supplied).

Decisions of the Courts of Appeals and lower Federal courts are consistent.[13] The purpose and regulatory

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[13] *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2nd Cir. 1959), "Congress intended to exercise as much of its constitutional power as it could in order to make the new Arbitration Act as widely effective as possible."; *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064 (2nd Cir. 1972), "the federal law is to be implemented in such a way as to make arbitration effective"; *Hart* v. *Orion Insurance Company*, 453 F.2d 1358, 1360 (10th Cir. 1971), "federal substantive law controls the issue of enforceability" and speaks of an "overriding federal policy favoring arbitration"; *Germany* v. *River Terminal Railway Company*, 477 F.2d 546 (6th Cir. 1973); *Galt* v. *Libbey-Owens-Ford Glass Company*, 376 F.2d 711, 714 (7th Cir. 1967), "whenever possible the courts will use the Federal Arbitration Act to enforce agreements to arbitrate * * *"'; *Aerojet General Corporation* v. *American Arbitration Association*, 478 F.2d 248, 251 (9th Cir. 1973), "the use of arbitration * * * should be encouraged by the federal courts * * *"; *Georgia Power Company* v. *Cimarron Coal Corporation*, 526 F.2d 101 (6th Cir. 1975); *J. S. & H. Construction Company* v. *Richmond County Hospital Authority*, 473 F.2d 212 (5th Cir. 1973), "Congress has expressed a strong policy favoring arbitration before litigation * * *." See also *Williston on Contracts* (Jaeger) 3rd Ed., Sec. 1921. As pointed out in the dissenting opinion below (Appendix A, pp. 54a-56a), cases such as *American Safety Equipment Corporation* v. *J. P. Maguire & Company*, 391 F.2d 820 (2nd Cir. 1968), are not applicable because in this case, arbitration is consistent with the regulatory statute and with agency approval of the arbitration clause at the time it issued the certificate. Cases such as *Wilko* v. *Swan*, 346 U.S. 427 (1952), do not apply for similar reasons.

scheme of the Natural Gas Act, particularly as construed in *Mobile*, *supra*, are furthered by a proper determination of contract obligations of the parties in accordance with the contract and the Arbitration Act. Moreover, in this instance, the Commission had an opportunity, *before approving the contract*, to require elimination or modification of the arbitration clause, but the Commission chose not to do so. See discussion in dissenting opinion, Appendix A, p. 56a. The majority thus has disregarded the controlling effect of the Arbitration Act in a manner conflicting with decisions of this Court and other Courts of Appeals.

2. The majority affirmed the Commission on the grounds that (1) "The FPC is charged with the responsibility to enforce the certificate, and in the performance of its duty, the Commission necessarily must resort to the terms of the contract," and (2) the arbitration provision is inapplicable because the Commission was not a party to the contract (Appendix A, p. 14a). The in-

congruity of these conflicting grounds apparently escaped the court.

An arbitration provision is one of the "terms" of a contract to which the Commission must resort in its enforcement of certificates. Neither the Commission nor the court below could contest the fact that the issues submitted for arbitration were disputes which came within the language of the arbitration provision. Thus, when the Commission resorted to the terms of the contract, it had no option but to await the results of the arbitration before proceeding with its enforcement procedures. The whole purpose of arbitration of contract disputes is to determine the meaning of a contract.

The Commission had found that the entire contract, including the arbitration procedures, was in the public interest as the nexus between the contract and the certificate. The court's statement that the Commission was not a party to the contract begs the question. As the dissent points out, the Commission had the arbitration provision before it when it certificated the contract (Appendix A, p. 56a). The Commission could have conditioned the certificate to eliminate arbitration of contract disputes, and Gulf then would have been aware of the actual conditions under which it was undertaking the regulated service. As the dissent puts it:

> "* * * the Commission cannot have it both ways. It cannot *approve* a contract as the basis of a certificate in the public interest and *later*, after performance by the parties, *abrogate* crucial portions of the approved contract ostensibly in the same public interest. Although cloaked with much authority, the Commission has no power to rewrite a contract it has approved." (Appendix A, p. 56a, emphasis supplied)

3. The court's decision would extend the authority of the Commission, and by implication, that of other regulatory agencies, to give ostensible approval to contract

provisions under which certificated service is commenced, but without being bound to honor the provisions it has approved. Proper administration of the Natural Gas Act thus is involved, and this case presents issues as to whether regulatory agencies may so entrap the regulated entity. Just as sellers receiving certificates of public convenience and necessity are expected to live up to their commitments, sellers, in turn, should be able to rely upon the regulatory agencies issuing such certificates to honor contractual provisions they have approved.

The court's suggestion that arbitration would be a "futility" because the Commission "would ultimately be free to ignore completely the arbitration results" (Appendix A, p. 15a)[14] reflects a misunderstanding of the effect of arbitration. That effect is more accurately stated in the dissenting opinion:

> "It is not whose interpretation of the contract provisions ultimately prevails; rather, it is whether the parties and the Commission should be bound by their agreement as to the *procedure* for the initial resolution of interpretation conflicts." (Appendix A, pp. 57a-58a)

To say that an agency, upon receipt of an arbitration decision can and should discharge its regulatory responsibilities does not mean that the agency can ignore the results of an arbitration. In an ordinary case, the Commission may make an *initial* interpretation of a contract, subject to judicial review *de novo*.[15] Here, where arbitra-

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[14] The court's statement that this was Gulf's view (Appendix A, p. 15a) was in error. Gulf's position, as stated in its Initial Brief to the court, was: "Arbitration will not impinge on the Commission's discharge of its responsibilities, once the contract questions are determined in the manner provided in the contract" (p. 24).

[15] See *Texas Gas Transmission Corporation* v. *Shell Oil Company*, 363 U.S. 263 (1960); *Warren Petroleum Corporation* v. *Federal Power Commission*, 282 F.2d 312 (10th Cir. 1960).

tion procedures have been certificated, the *initial* interpretation of the contract, when arbitration is invoked, is left to a Board of Arbitrators.

Nothing in the Arbitration Act, or in the many cases recognizing Congressional policy favoring such arbitration, indicates that the decision of the arbitrators would be a nullity. However, the extent to which an agency such as the Commission then would be bound by the arbitrators' decision would depend on results of the arbitration, including, among other things, whether the issues resolved involved ordinary contract questions or other matters that could call for application of an agency's special expertise. In any event, that issue was not before the court below, nor could it say, in advance, that arbitration would be meaningless. Such interpretation of an arbitration provision renders it a nullity, a result not intended by the parties, and in conflict with Commission approval of a contract and with the Arbitration Act, as construed by this Court and other Courts of Appeals.

Proper administration of the Natural Gas Act and its relation to the Federal Arbitration Act require resolution of these conflicts. This case thus presents major federal questions which should be reviewed and resolved by this Court.

II. The Decision As To Commission Power To Order "Refunds" or "Damages" Is In Conflict With This Court's Constructions of Sections 4 and 7 of the Natural Gas Act; Is In Conflict With Constructions of Section 16 of That Act by Other Courts of Appeals; and Is A Misconstruction of the Act Generally Applicable To Regulated Natural Gas Companies That Should Be Reviewed By this Court

The Court of Appeals affirmed Commission orders requiring payments exceeding $100,000,000 in principal and interest, variously styled "refunds," "damages," or "compensation," which have no statutory basis.[16] In so holding, the court has construed the Natural Gas Act in a manner conflicting with this Court's constructions of Sections 4 and 7 of that Act and other Courts of Appeals' constructions of Section 16 of that Act.

The court concluded that Commission authority to enforce delivery obligations under a certificate issued under Section 7(c) is accompanied by substantive authority under Section 16 to order "refunds" as "compensation" for delivery deficiencies even though the certificate holder must make up those deficiencies, has collected no amounts subject to refund, and has charged, at all times, only the rates on file and effective under Section 4 of the Act. Such unprecedented construction of the Act can be applied to thousands of certificates issued to natural gas producers and pipelines under Section 7(c), would enlarge Commission "powers" to order "refunds" or "damages," and thus presents major issues in administration of the Act warranting full review by this Court:

1. The Court of Appeals' holding is in conflict with this Court's decision as to limitations on Commission authority to order "refunds" or other monetary payments under the Natural Gas Act.

Under Section 4, the filing of a rate schedule and changes of rates establishes effective, "filed rates" as the basis for charges and liabilities of the regulated company which are not subject to collateral change or retroactive modification. *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, 341 U.S. 246 (1951); *Hope Natural Gas Company* v. *Federal Power Commis-*

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[16] At the time of its decision, the Commission estimated that the principal amount of the "refunds" by Gulf would be $89,600,000 and imposed requirements for payment of interest of 7% and 9% for specific past periods. In a report filed with the Commission on December 15, 1976, Gulf estimated that the total amounts through October 31, 1976 would exceed $100,000,000 in principal and interest.

sion, 134 F.2d 287 (4th Cir. 1943), rev'd. on other grds., *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944). While the Commission may suspend a change of rates under Section 4 and, after decision, order refund of amounts collected subject to refund, the Commission cannot change effective, unsuspended rates retroactively and has no authority to order "reparations" as to past periods covered by such filed, effective rates. *Federal Power Commission* v. *Hope Natural Gas Company, supra; State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954).

The Court of Appeals apparently recognized that as to the past periods covered by the "refund" order in this case, Gulf had in effect, at all times, filed, effective rates under Section 4 so controlling its rights and liabilities under the Act and had collected no amounts subject to refund. However, the court failed to attempt to reconcile the conflict between the Commission order directing "refunds" as to past periods and the "filed rate" doctrine under Section 4 and prohibitions upon Commission action changing rates retroactively or ordering "reparations," as expressed in the opinions of this Court.

Similarly, Commission power to order "refunds" under Section 7(c) has been limited to amounts actually collected under temporary authorizations or "conditions" as to interim rates expressed in permanent certificates issued under that section. *United Gas Improvement Company* v. *Callery Properties*, 382 U.S. 223 (1965). In the absence of such "conditions," the filed, effective rate under Section 4 controls the monetary payments by or to the regulated company and cannot be modified collaterally or retroactively under Section 7. *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U.S. 9, 23-24 (1968). Commission enforcement of "delivery obligations" under permanent certificates issued under Section 7(c) thus

must be by means of orders directing deliveries, and, if necessary, proceedings for judicial enforcement of such orders as to deliveries under Sections 20 and 22 of the Act. See *United Gas Pipe Line Company* v. *Federal Power Commission*, 385 U.S. 83 (1966); *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956).

Neither Section 7(c) nor any other section of the Act contains language empowering the Commission to accompany an order under Section 7(c) directing current and future compliance with a certificate with awards by it of "refunds" or "damages" for both past and future periods in derogation of an unconditioned permanent certificate issued under Section 7(c) and of filed, effective rates under Section 4. The sections of the Commission's orders directing payment of "refunds" as a purported and newly discovered "remedy" for deficiencies in deliveries under a certificate issued under Section 7(c) thus are beyond the scope of enforcement powers available to the agency itself. At the same time, those orders and any payments thereunder are in derogation of and in conflict with a permanent certificate issued under Section 7(c) without "conditions" as to refundable amounts and with the filed, effective rates under Section 4.

The Court of Appeals has failed to consider the collision between such novel, unprecedented orders and settled constructions of Sections 4 and 7. Its conclusion conflicts with this Court's constructions of Sections 4 and 7, recognizing the statutory limitations upon the agency's authority to order such payments, whether labelled "refunds," "damages," or something else.[17]

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[17] The difficulty below with finding lawful authority for the Commission's invalid "refund" order is illustrated by the varying labels used, such as "refunds," "damages," "compensation," and "performance bond." (*cf.* Appendix A, p. 37a; Appendix D, pp. 80a, 82a, 91a).

2. The Court of Appeals recognizes that its conclusions as to Commission authority under Section 16 of the Act are in conflict with constructions of Section 16 by other Courts of Appeals (Appendix A, pp. 36a, 37a).

Section 16 of the Act, typical of statutory provisions for agency "house-keeping," empowers the Commission to perform acts and issue orders "necessary or appropriate to carry out the provisions" of the Act. 15 U.S.C. § 717o. As construed in *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973), Section 16 does not enlarge substantive powers set out in other sections of the Act. Section 16 and the analogous provision of the Federal Power Act thus are construed to provide the Commission power to implement authority *otherwise* conferred by the statutes;[18] and, as this Court has held, Section 16 "does not authorize the Commission to set at naught an explicit provision of the Act." *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380, 394 (1974).

Despite these constructions, the Court of Appeals chose to follow conflicting, expansive reading of Section 16 in *Mesa Petroleum Corporation* v. *Federal Power Commission*, 441 F.2d 182 (5th Cir. 1971). The court recognized that *Mesa*, unlike this case, involved an unauthorized "abandonment" under Section 7(b) of the Act and termination of deliveries (Appendix A, pp. 31a-37a); but reasoned erroneously that Gulf had "terminated part of its

[18] See *Mobil, supra*, and *New England Power Company* v. *Federal Power Commission*, 467 F.2d 425, 426 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974); *City of Chicago* v. *Federal Power Commission*, 458 F.2d 731 (D.C. Cir. 1971), *cert. den.* 405 U.S. 1074 (1972); *Murphy Oil Corporation* v. *Federal Power Commission*, 431 F.2d 805, 810 (8th Cir. 1970). As stated in *Murphy*: "In certain situations, such as the one in Mississippi River Fuel Corp. v. Federal Power Commission, 108 U.S. App. D.C. 284, 281 F.2d 919 (1960), hereafter discussed, the Commission can utilize § 16 authority to effectuate its orders lawfully entered, but § 16 is not an enlargement of the specific authority granted the Commission under §§ 4, 5, and 7 of the Act." (431 F.2d at 810).

certificated service" under Section 7(c), and that the Commission therefore had "discretion" to fashion a "remedy" of monetary payments. Since Section 7(c) provided no basis for such an order, the court found such substantive authority in Section 16, despite recognition that "the interpretations of Section 16 in *Mesa* and *Mobil Oil* are irreconcilable" (Appendix A, p. 37a).

The Court of Appeals thus has read Section 16 in a manner conflicting with the recent, controlling constructions by the District of Columbia and Eighth Circuits in *Mobil*, *Murphy*, and other cases[19] and with this Court's cautionary language as to expansive reading of Section 16 in *Federal Power Commission* v. *Texaco Inc.*, *supra*. Under Sections 7(c), 20, and 22 of the Act, Congress specified the means and procedures for Commission enforcement of delivery "obligations" under Commission certificate orders. There was and is no "necessary" or "appropriate" reason to enlarge Commission "refund" powers in a manner conflicting with Section 4 of the Act; but if this expansive construction of Section 16 by the court below should stand, the Commission may proceed without regard to its defined powers and functions under Sections 4 and 7 and to the role of the courts contemplated by Congress in Sections 20 and 22.

The conflict in constructions of Section 16 by the Courts of Appeals as to the scope of agency "remedial powers" thus must be resolved by this Court.

3. The general shortage of natural gas and resultant curtailments and reductions in deliveries have caused increasing litigation over Commission authority and liabili-

[19] *Mobil Oil Corporation* v. *Federal Power Commission, supra; Murphy Oil Corporation* v. *Federal Power Commission, supra; Texaco Inc.* v. *Federal Power Commission*, 474 F.2d 416, 420 (D.C. Cir. 1972), vacated and remanded, 417 U.S. 380 (1974); *American Smelting & Refining Company* v. *Federal Power Commission*, 494 F.2d 925, 933 (D.C. Cir.), *cert. den.*, 419 U.S. 882 (1974).

ties of a regulated "natural-gas company" for alleged violations of certificate obligations, contracts, service agreements and for "damages" for underdeliveries.[20] In these cases, the courts generally have deferred to Commission jurisdiction over the volumetric conditions of service and curtailment plans, but issues of Commission jurisdiction to order "damages" for alleged "underdeliveries" have been unresolved. While the decision below applies to a producer certificate, the constructions of Sections 7(c) and Section 16 of the Act are, by their terms, applicable to any certificated sale and any Commission assertion of substantive powers under Section 16 to fashion monetary remedies in the form of "refunds" or "damages" upon a finding that underdeliveries violate a certificated agreement.

The importance of these issues and of the conflict between the circuits as to Commission substantive authority under Section 16 thus extends beyond the present case. In a time of shortage, compliance by pipelines and producers with certificates issued under Section 7 increasingly is drawn into question; demands for "remedies" for delivery deficiencies increase; and urgency for authoritative decision as to Commission "remedial" powers by way of monetary awards mounts. The conflict in circuits as to construction of Section 16, correctly perceived below, and the questions of Commission powers under Section 7(c) raise issues of major importance in the administration of the Natural Gas Act which should be reviewed and resolved by this Court.

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[20] See *Monsanto Company* v. *Federal Power Commission*, 436 F.2d 799 (D.C. Cir. 1972); *International Paper Company* v. *Federal Power Commission*, 476 F.2d 121 (5th Cir. 1973); *Atlanta Gas Light Company* v. *Federal Power Commission*, 476 F.2d 142 (5th Cir. 1973); *State of Louisiana* v. *Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974); *Mississippi Public Service Commission* v. *Federal Power Commission*, 522 F.2d 1345 (5th Cir. 1975), *cert. den.*, 429 U.S. 870 (1976).

III. The Decision As To A Producer's Daily Delivery Obligations Raises A Question of General Importance Under the Act and Will Adversely Affect Current and Future High-Priority Natural Gas Consumers

While expressed by reference to language in the Gulf contract, the decision below as to a natural gas producer's daily delivery obligations has an impact beyond this case and, if not reversed, will cause accelerated depletion of currently proven natural gas reserves, to the detriment of high-priority consumers, such as those in the Eastern states dependent upon the Texas Eastern system.

"Swing" provisions in long-term producer contract executed in the 1960s and early 1970s are not uncommon. In rulemaking proceedings for almost a decade, the Commission indicated a policy preference for such provisions under which (1) a daily contract quantity (DCQ) is fixed and modified from time to time on the basis of deliverability of the producer's reserves; (2) a lower quantity, such as 80% of that DCQ, establishes a minimum "take-or-pay" obligation of the pipeline purchaser, frequently applied on an annual basis; and (3) a higher quantity, such as 125% of the DCQ, establishes the producer's maximum delivery obligation on any one day.[21] Such provisions contemplate "swing" in the producer's

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[21] The Commission's proposed rules and policy statements as to such clauses appeared in *Contracts Between Independent Producers and Interstate Natural Gas Companies Containing Certain Provisions in Daily-Contract-Quantity and Take-Or-Pay-For Clauses*, "Non-Acceptability" (Notice Issued May 22, 1961, FPC Docket No. R-199), 26 Fed. Reg. 4615 (1961); *Independent Producers and Interstate Natural Gas Companies*, "Nonacceptability of Contracts Containing Certain Provisions in Daily-Contract-Quantity and Take-or-Pay-for Clauses" (Notice Issued March 16, 1965, FPC Docket No. R-199), 30 Fed. Reg. 3175 (1965); and *Limitation on Provisions in Natural Gas Rate Schedules Relating to Minimum Take Provisions*, "Notice of Proposed Rulemaking" (Notice Issued September 23, 1970, FPC Docket No. R-400), 35 Fed. Reg. 15163 (1970).

daily deliveries, with the DCQ providing the basis for annual total deliveries, and with the "maximum" quantity available primarily for "peak" demands on the pipeline system, such as occurs in cold weather.[22]

Although the Commission did not adopt a rule mandating such provisions, its proposed rules were pending in 1963, and its policy preferences were published and well-known. The "swing" provision in the Gulf-Texas Eastern contract thus was written in this context and was so reviewed and analyzed in the 1963 Commission Staff Memorandum which was not made available to Gulf until the eve of oral argument in the Court of Appeals. Indeed, in the Commission's 1963 order issuing certificates to Gulf and Texas Eastern, the Commission noted Texas Eastern's intention to take quantities exceeding the DCQ ". . . on a peak day from this source of supply" (I App. 56).

The Court of Appeals failed to consider any of these relevant materials reflecting such industry practice and Commission statements, refusing even to remand to permit reconsideration in light of the long-sought 1963 Staff Memorandum demonstrating errors in the current Commission interpretation of a "swing" provision. Instead, the Court of Appeals referred only to language in a few sections of the contract divorced from the context in which it was drawn, the relevant industry and regulatory conditions, and the operations contemplated. Yet, the court found this to be a "close question" and was "disturbed" by failure of the Commission to reconcile the "Daily Contract Quantity" and "swing" provision with

[22] See, Rebman, "Drafting Natural Gas Sales Contracts—The Producer-Seller's View," 19 *Rocky Mt. Min. L. Rev.* 205, 227 (1974); Gregg, "Negotiating and Drafting Gas Purchase Contracts on Behalf of the Seller," 13 *Oil & Gas Inst.* 87, 118-119 (1962); Howell, "Natural Gas Purchase Contracts," 5 *Rocky Mt. Min. L. Rev.* 221, 256 (1960); Williams and Myers, "Swing," *Manual of Oil and Gas Terms* 586 (4th ed. 1976).

an order that would compel Gulf to deliver, day in and day out, the maximum quantity once intended to be a "peaking" source during colder weather and high demands on a pipeline system (*cf.* Appendix A, pp. 9a-10a; 11a).

Compliance with such an order obviously will shorten the contemplated term of the Gulf-Texas Eastern contract and will accelerate depletion of presently proven natural gas reserves. If daily deliveries must be sustained at the peaking quantity of 625,000 Mcf per day instead of an annual average of the DCQ of 500,000 Mcf, exhaustion of available reserves will occur earlier, and long-term stability of this major supply source for Texas Eastern's system will be shortened dramatically. Yet, such considerations were ignored below, even in discussion of "obligations" under a certificate issued under the "present and future public convenience and necessity" standard of Section 7(c) of the Act.

Such elimination of "swing" provisions has implications extending beyond this one producer contract because of use of the concept in pipeline-producer operations and other long-term contracts. The general shortage of natural gas has resulted in Commission rulemaking proceedings seeking to clarify producers' delivery obligations under existing and new producer certificates[23] and in general investigations as to contract delivery obligations and producer performance, particularly in the offshore area.[24] Inevitably, the holding in this case, which is tantamount to converting a maximum or peaking

[23] To date, the Commission has adopted in its Order No. 539-B what it termed a "prudent operator standard" to assess performance, but the rule is on review, *sub nom. Shell Oil Company* v. *Federal Power Commission*, Nos. 76-3066, *et al.* 5th Circuit.

[24] *E.g., Certain Producer and Pipeline Respondents*, FPC Docket No. RI75-112, now pending before an Administrative Law Judge after extensive formal hearings.

quantity into a daily delivery obligation, can carry over to these other proceedings, even for contracts not including "warranty" language.[25] The result is a direct conflict between such constructions of producers' contracts and efforts to conserve proven reserves and to husband natural gas for both current and future high-priority consumers. Under the holding in this case, production in the immediate future must be accelerated primarily to benefit low-priority users without regard, as here, for availability of supplies in the 1980-1990 decade.

These implications require review of a "swing" provision and a producer's daily delivery obligations in the context of impact and of industry practice, including documents such as the long-sought 1963 FPC Staff Memorandum finally made available in this case under the Freedom of Information Act in June, 1977. The questions obviously are of importance to Gulf and to Texas Eastern's system for which Gulf is a major producer supplier, but the implications in administration of the Act and for interstate consumers extend far beyond an ordinary question of contract construction. Therefore, the erroneous excision of the "swing" concept and conversion of a "peaking" volume into a daily delivery obligation also present questions warranting review by this Court.

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[25] Counsel for the State of North Carolina already has urged such an application of the Commission holdings in this case to producers supplying Transcontinental Gas Pipe Line Corporation. See, "Brief on Exceptions for State of North Carolina and North Carolina Utilities Commission," filed August 5, 1977, in proceedings styled *Transcontinental Gas Pipe Line Corporation (Investigation of Curtailment Levels)*, Docket No. RP75-51.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 25, 1977